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Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty

JOSEPH L. HOFFMANN*

In October, 1992, during the first session of the U.S. Supreme Court's new Term,¹ the Court heard oral arguments in *Herrera v. Collins*,² a major death-penalty case. In *Herrera*, the Court was asked to decide, for the first time, whether a death-row inmate's claim of actual innocence, not linked to any particular procedural errors that might have occurred during the inmate's state trial or appellate litigation, may serve as the basis for a grant of federal habeas corpus relief.

Later in the Term, the Court will hear oral arguments in *Withrow v. Williams*,³ a major habeas corpus case. *Williams* represents the Court's second attempt in less than a year to redefine the standard of review to be used by a federal habeas court in reexamining a so-called "mixed" (fact-and-law) constitutional issue that was previously decided by a state court.⁴ On

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1. In 1992, Congress considered several proposals to amend the federal statute that authorizes habeas review of state criminal convictions, 28 U.S.C. § 2254. The habeas proposals, along with others covering a variety of criminal law issues, including gun control and the federal death penalty, failed to pass. See *Bush's Assassination of the Brady Bill*, WASH. POST, Nov. 2, 1992, at A23.

Although these habeas reform proposals would have greatly altered the terrain of federal habeas described in this Essay, and although the proposals (or others like them) may reappear in future congressional sessions, I have chosen to ignore them. The U.S. Supreme Court itself has referred to the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). Until and unless Congress finally acts, the Court will undoubtedly continue to define the nature and scope of federal habeas, relatively unfettered by traditional notions of statutory construction or legislative intent.

2. 113 S. Ct. 853 (1993), *aff'g* 954 F.2d 1029 (5th Cir. 1992). For an assessment of *Herrera*, see Author's Epilogue, *infra* text accompanying notes 80-87.

3. 944 F.2d 284 (6th Cir. 1991), *cert. granted*, 112 S. Ct. 1664 (1992) (No. 91-1030).

4. In *Miller v. Fenton*, 474 U.S. 104 (1985), a habeas case involving the "mixed" issue of the voluntariness of a defendant's confession, the Court acknowledged that "an unbroken line of cases forecloses the conclusion that the 'voluntariness' of a confession merits something less than independent federal consideration." *Id.* at 112. These "mixed" issues constitute the most significant category of federal issues on which a habeas court, at present, remains free to reverse the previous ruling of a state court with which it disagrees. In the context of factual issues, by contrast, 28 U.S.C. § 2254(d) requires deference to prior state-court adjudications; in the context of legal issues, a habeas court is free to reverse a conviction only if the state court erred under the federal law that was clearly applicable at the time of the state proceeding. See *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague v. Lane*, 489 U.S. 288 (1989).

June 19, 1992, the Court announced its judgment in *Wright v. West*,⁵ another habeas case posing the same standard-of-review question. Although all nine Justices agreed in *West* that the lower court's grant of habeas relief should be overturned, and that the petitioner's state conviction should be upheld, no opinion was joined by more than three of the Justices. In all, the Justices wrote five separate opinions in *West*,⁶ mostly for the purpose of discussing the appropriate standard of review.

Although it may not appear so at first glance, *Herrera* and *Williams* are in fact closely related. The two cases both spring from the same historical source—the Supreme Court's adoption, in the late 1970s, of an essentially process-oriented approach to interpreting the Eighth Amendment's Cruel and Unusual Punishment Clause.⁷ Ever since the Court made the fundamental (and, I believe, misguided) jurisprudential choice to treat the Eighth Amendment as a "super due process clause,"⁸ rather than as an invitation for the federal courts to review the merits of individual state-imposed death sentences, the Court has struggled to resolve the tension between a narrow focus on death-penalty procedures and the (substantive) view that federal judges have a responsibility to prevent state-imposed death sentences from being carried out when such sentences are undeserved.

This struggle has taken place in two separate arenas—the law of the death penalty under the Eighth Amendment and the law of federal habeas corpus. In the Eighth Amendment arena, the Court's process orientation has triggered a doctrinal explosion, as the Court searches for perfect death-penalty procedures that can guarantee a perfect result.⁹ In the habeas arena, the

5. 112 S. Ct. 2482 (1992).

6. Justice Thomas announced the opinion of the Court, and wrote an opinion joined by Chief Justice Rehnquist and Justice Scalia, in which he suggested that, although it was not essential to a reversal of the grant of habeas relief in *West*, the logic of *Teague*, 489 U.S. 288, might support a deferential habeas standard of review for "mixed" issues. *West*, 112 S. Ct. at 2484. Justice O'Connor, joined by Justices Blackmun and Stevens, argued that *Teague* had nothing to do with "deference" to state-court adjudication, and that rejection of the de novo standard of review would be a substantial and unwarranted change in habeas law. *Id.* at 2493 (O'Connor, J., concurring in the judgment). Justice Kennedy agreed that *Teague* was not about "deference," and thought the existence of *Teague* actually supported de novo review of "mixed" issues, but declined to resolve the standard-of-review question. *Id.* at 2498 (Kennedy, J., concurring in the judgment). Justice Souter felt that *Teague* itself required reversal in *West*, without regard to the proper habeas standard of review. *Id.* at 2500 (Souter, J., concurring in the judgment). Finally, Justice White, in a one-sentence concurrence, simply found the lower court's grant of habeas relief inappropriate, without mentioning the standard-of-review question. *Id.* at 2493 (White, J., concurring).

7. The Eighth Amendment reads, in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

8. See Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148 (1980).

9. See, e.g., cases cited and discussed *infra* notes 29-36 and accompanying text.

Court, motivated in large part by the growth of Eighth Amendment law, has restricted the availability of habeas relief in all cases, whether capital or noncapital, on a variety of procedural grounds.¹⁰ These procedural habeas restrictions, however, often can be avoided (and habeas relief obtained) if a petitioner can present a colorable claim of actual innocence.¹¹

Thus, by a bizarre and convoluted path, the Court has reached the conclusion that the substantive merits of a death-row inmate's case are relevant to the disposition of his habeas petition. But the relevance is indirect and limited—actual innocence is sometimes a necessary, but (at least presently) never a sufficient, condition for a grant of habeas relief.¹²

Seen against this jurisprudential background, *Herrera* and *Williams* are flip sides of the same coin. On the one hand, *Herrera* tests the bounds of the Court's determination to stick with a process-oriented approach to the Eighth Amendment. In the special realm of death-penalty law, a claim of actual innocence surely gives rise to the most compelling of all possible arguments that the Eighth Amendment has case-specific substantive significance. *Williams*, on the other hand, provides the Court with an opportunity to continue the gradual transformation of federal habeas corpus from a remedy for all constitutional errors into a vehicle for evaluating the substantive merits of a state prisoner's case—whether those merits are measured in terms of actual innocence (in the typical, noncapital criminal case, such as *West* and *Williams*) or the moral deservedness of a prisoner's death sentence. As I will explain below, this transformation of habeas, which was advocated decades ago by Judge Friendly,¹³ is a predictable, and perhaps inevitable, by-product of the Court's refusal to read the Eighth Amendment as authorizing federal courts to review the merits of individual death sentences.

Indeed, although both *West* and *Williams* are noncapital cases, perhaps the best explanation for the Court's surprising failure in *West* to coalesce behind a heightened habeas standard of review for "mixed" constitutional issues is the recognition, by at least some Justices,¹⁴ that the procedural orientation

10. See, e.g., cases cited and discussed *infra* notes 49-54 and accompanying text.

11. See, e.g., cases cited and discussed *infra* notes 55-56 and accompanying text.

12. But see *Herrera v. Collins*, 113 S. Ct. 853 (1993), *aff'g* 954 F.2d 1029 (5th Cir. 1992) (presenting this issue).

13. See, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); see also John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990) (arguing for limited version of "innocence" approach).

14. I would put Justices O'Connor, Blackmun, Stevens, and Kennedy clearly within this group. Justice White may also belong within the group—although he said nothing in *West* to tip his hand, he was clearly a reluctant supporter of the Court's closely related restriction of habeas in *Teague v. Lane*, 489 U.S. 288 (1989), where he concurred in the judgment only, and in *Penry v. Lynaugh*, 492 U.S. 302

of modern Eighth Amendment law already severely limits the ability of habeas courts in capital cases to "do the right thing." These Justices may have realized that if the Court in *West* eviscerated another major category of habeas claims by ordering habeas courts to defer substantially to previous state-court resolutions of "mixed" issues,¹⁵ then the habeas courts might be rendered impotent in the face of even a clearly incorrect use of the death penalty, because those courts might be unable to find a constitutional error on which to set aside the death sentence. In short, these Justices may have preserved de novo habeas review of "mixed" issues in part because such review allows habeas courts to reach, in individual capital cases, a sometimes highly desirable substantive goal—the setting aside of undeserved death sentences.

As long as the Court's Eighth Amendment emphasis remains primarily procedural, further evolution of habeas law in the direction of making habeas relief increasingly contingent on the merits of a state prisoner's case is likely. By forcing habeas courts to consider the merits of each criminal case (including the moral deservedness of each use of capital punishment) as a prerequisite to awarding habeas relief, the Court may be able to accomplish through the reform of habeas law at least part of what it has failed to achieve via the Eighth Amendment—namely, to empower the federal courts to perform (at least in a limited fashion) the important substantive function of separating those state death-row inmates who truly deserve the death penalty, and hence ought not to obtain habeas relief, from those who do not.

* * * * *

Twenty years after the Court's landmark decision in *Furman v. Georgia*,¹⁶ which kicked off the modern era of death-penalty law, the Court is not much closer than it ever was to resolving the tension between procedure and substance in its death penalty jurisprudence under the Eighth Amendment. Nor is it clear that the Court will ever succeed in its quest for a satisfactory approach to the federal review of state death-penalty cases. The root of the problem lies in the simple fact that the Justices are both lawyers and human beings.

(1989), where he joined the Court's opinion, but wrote separately, apparently to express his lack of enthusiasm for the Court's position.

15. See *supra* note 4 (discussing the current limits on federal habeas review of purely factual and purely legal issues). In addition, the habeas doctrines of exhaustion, abuse-of-the-writ, successive petitions, and especially procedural default further restrict the availability of federal habeas relief, even if a particular issue is generally within the scope of a habeas court's review. See *infra* text accompanying notes 49-54.

16. 408 U.S. 238 (1972).

Why does the allegedly conservative, pro-federalism, and anti-criminal-defendant Court continue frequently to grant review in, and often to reverse, state death-penalty cases?¹⁷ Why does Eighth Amendment law continue to grow more and more complicated, despite the impassioned pleas from Justice Scalia to simplify and reduce these federal procedural restrictions on the states?¹⁸

The answer, of course, is that the Justices are only human. This is important for two reasons. First, as human beings, the Justices know that they and their fellow human beings are imperfect—human decision makers will inevitably make mistakes. Second, as human beings, the Justices (or at least most of them) care more about reaching the right result in a death-penalty case than they do in almost any other kind of case that comes before them. Perhaps the most important task any judge can ever perform is to ensure that the government not kill a person unless that person truly deserves to die (which means, under our current laws, that the person is both guilty of a capital crime and among the most death-deserving of those persons who are guilty of such crimes). Since the Court is effectively the last decision maker in most capital cases,¹⁹ and since the Court's decision to allow an execution to proceed is irrevocable, the Justices (or at least most of them) feel a special responsibility for the outcome. In the words of Justice Stewart's plurality opinion in *Woodson v. North Carolina*, death is "different"²⁰—if for no other reason than precisely because most members of the Court, and most of the rest of us as well, believe it is so.

Because they are only human, the Justices (or at least most of them), along with most of the judges in the lower federal courts, pay much closer attention

17. During the most recently completed Term, the Court granted certiorari, ordered full briefing, and heard oral argument in seven death-penalty cases, and ruled for the defendant in five of them. *See Morgan v. Illinois*, 112 S. Ct. 2222 (1992); *Sochor v. Florida*, 112 S. Ct. 2114 (1992); *Stringer v. Black*, 112 S. Ct. 1130 (1992); *Dawson v. Delaware*, 112 S. Ct. 1093 (1992); *Riggins v. Nevada*, 112 S. Ct. 1810 (1992). *But see Medina v. California*, 112 S. Ct. 2572 (1992); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

18. *See, e.g., Walton v. Arizona*, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia argued for reversal of the entire line of cases based on *Lockett v. Ohio*, 438 U.S. 586 (1978), because of "confusion" engendered by the Court's Eighth Amendment decisions. In his view, for state legislatures, "the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow." *Walton*, 497 U.S. at 668.

19. In at least some capital cases, a state's governor or other executive official may choose to exercise, or decline to exercise, the commutation power even after the Supreme Court has rendered final judgment on the case.

20. The "qualitative difference" between death and all other penalties requires a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plurality opinion).

to the outcomes in capital cases than they do in other criminal cases. The experience of twenty years since *Furman* suggests that, like moths to a flame, federal judges cannot avoid getting involved in state capital cases—these cases consistently receive far closer federal scrutiny than noncapital criminal cases, even in a relatively conservative era and almost regardless of the particular federal judge's ideological or jurisprudential views.²¹ And whenever a judge finds a capital case in which he or she believes an injustice is about to be done, the judge is naturally inclined to do whatever is in his or her judicial power (and maybe even a few things that arguably are not)²² to rectify the perceived injustice.

The simplest and most direct way for a federal judge to reverse the outcome of a state capital case with which the judge disagrees would be to rule that the death penalty is unconstitutional (in Eighth Amendment terminology, that it constitutes "cruel and unusual punishment") as applied to the individual death-row inmate. But the Court, in a series of death-penalty cases dating back to 1976, has declined to lead the lower federal courts down the path of case-by-case substantive review of state capital cases under the Eighth Amendment.²³

Rather, the Court has done what most lawyers tend to do—it has tried to find procedural solutions for a substantive problem. One of the basic traits of most lawyers is an extremely strong belief in the value of procedures. Lawyers and judges tend to believe (or at least tend to pretend to believe) that, at least in theory, if a procedure can be improved enough, then the results produced by that procedure will necessarily be right.

The course of modern Eighth Amendment death-penalty law reflects this lawyerly overconfidence in the value of procedures. In 1972, in *Furman v. Georgia*,²⁴ the Court struck down all existing state death-penalty statutes because it was profoundly disturbed by the results they produced. The Justices found the death penalty, as administered by the states, to be arbitrary, discriminatory, "freakish[]," or a combination of the above.²⁵ Four years later, in *Gregg v. Georgia*²⁶ and its companion cases,²⁷ the Court allowed

21. See Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 18-19 (1992).

22. This may explain the remarkable colloquy between the U.S. District Court for the Northern District of California and the U.S. Supreme Court in connection with the execution of Robert Alton Harris in early 1992, in which the Supreme Court ultimately barred the District Court (and all other lower federal courts) from granting any further stays of execution. See *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 112 S. Ct. 1653 (1992).

23. See, e.g., *Sochor v. Florida*, 122 S. Ct. 2114 (1992); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg v. Georgia*, 428 U.S. 153 (1976).

24. 408 U.S. 238 (1972).

25. *Id.* at 310.

26. 428 U.S. 153 (1976).

27. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

the states to try again under new death-penalty statutes. The primary difference between the pre-*Furman* and post-*Furman* statutes was the adoption of a "guided discretion"²⁸ approach to capital sentencing, in which the states created new procedures and instructions designed to help the sentencer (whether judge or jury) make a better choice between life and death for a particular defendant. The *Gregg* Court apparently felt that the *Furman* problem of morally inappropriate death sentences in the states could be solved simply by improving the procedures of capital sentencing.

In several post-*Gregg* cases, the Court has confronted the claim that, despite these improved procedures, the death penalty was nevertheless imposed against a person who did not deserve it. For example, in *Lockett v. Ohio*,²⁹ the Court reviewed the case of Sandra Lockett, who (based on the evidence introduced at her trial) did nothing more than agree to drive the getaway car for three men who intended to rob a pawnshop.³⁰ In the course of the robbery, one of the men shot and killed the pawnbroker, but Lockett never realized that such a killing might occur, and was not physically present in the pawnshop when it happened.³¹ For various reasons, none of the men received a death sentence, but Lockett did.³²

The Court could have decided that, under the totality of the circumstances, the Eighth Amendment barred the imposition of a death sentence against Sandra Lockett. This substantive position was in fact advocated by Lockett's attorneys (who included Anthony Amsterdam) in both the petition for certiorari and the brief on the merits.³³ Instead, however, the Court chose to reverse Sandra Lockett's death sentence on a procedural ground, apparently concluding that the sentencing judge would have reached the right result if only the Ohio statute had not prevented him from considering Lockett's minor role in the crime as a "mitigating circumstance[]." ³⁴

Similarly, in *Godfrey v. Georgia*,³⁵ where the defendant instantly killed his wife and his mother-in-law with a shotgun during a domestic dispute, and then calmly turned himself in to the police, the Court could have declared that such a case simply was not a proper one for the imposition of a death sentence.

28. See *Wainwright v. Witt*, 469 U.S. 412, 454 (1985); *McCleskey v. Kemp*, 481 U.S. 279, 334 (1987).

29. 438 U.S. 586 (1978).

30. *Id.* at 590.

31. *Id.*

32. *Id.* at 591-94.

33. See Petition for Certiorari at 42-45, *Lockett v. Ohio*, 438 U.S. 586 (1978) (No. 76-6997); Brief for Petitioner at 61-68, *Lockett* (No. 76-6997).

34. *Lockett*, 438 U.S. at 608.

35. 446 U.S. 420 (1980).

Rather, the Court chose to reverse Godfrey's death sentence on another procedural ground, apparently concluding that the jury would have reached the right sentencing result if only it had received a proper instruction about the statute's "aggravating circumstance" provision that the crime be "wanton, vile, or heinous."³⁶

In these and other post-*Gregg* decisions, the Court has struggled mightily to find procedural solutions to what appear to have been, at bottom, substantive disagreements with the outcomes of the particular cases. The Court has occasionally, to be sure, focused its attention in a death-penalty case on substance rather than procedures. But the Court has done so only when it could identify an entire class of defendants, subject to easy legal definition, that it believed should be categorically ineligible for the death penalty. Thus, in *Coker v. Georgia*,³⁷ the Court excluded from death-eligibility the class of rapists who do not kill. Likewise, in *Tison v. Arizona*,³⁸ the Court excluded certain felony-murderers who do not themselves kill, defining the class of death-ineligible persons in standard legal terms based on the presence or absence of "indifference to the value of human life."³⁹ And in *Thompson v. Oklahoma*⁴⁰ and *Stanford v. Kentucky*,⁴¹ the Court established that juveniles under age sixteen at the time they commit the crime cannot be given the death penalty, but those sixteen or above can.

By contrast, in *Penry v. Lynaugh*,⁴² a majority of the Court declined to exclude mentally retarded defendants as a class from death eligibility because Justice O'Connor, who provided the crucial fifth vote rejecting the substantive argument, could not find an easy legal definition for the kind of mental retardation that necessarily renders an individual defendant undeserving of the death penalty.⁴³ Instead, a different majority of the Court reversed the death sentence on yet another procedural ground—that the Texas statute prevented the sentencing jury from giving full consideration to the defendant's mental retardation as a "mitigating circumstance."⁴⁴

36. *Id.* at 431-32.

37. 433 U.S. 584 (1977).

38. 481 U.S. 137 (1987). *Tison* modified the earlier standard of *Enmund v. Florida*, 458 U.S. 782 (1982), in which the Court had held the death penalty inapplicable to felony-murderers who do not kill, intend to kill, attempt to kill, or intend that lethal force be used by an accomplice.

39. *Tison*, 481 U.S. at 157-58.

40. 487 U.S. 815 (1988).

41. 492 U.S. 361 (1989).

42. 492 U.S. 302 (1989).

43. "On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability . . . inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Id.* at 338 (O'Connor, J.).

44. *Id.* at 319-28.

There are two major difficulties with an essentially process-oriented solution to a substantive problem, such as the problem of bad outcomes in death-penalty cases. First, and most obviously (despite the traditional lawyer's view), even perfect procedures cannot guarantee perfect results—which means that procedural law may wind up being pushed beyond its proper limits. If a federal judge, for instance, is disturbed by what he or she perceives to be the wrong result in a capital case, and if the only way to reverse the decision is to find a federal procedural error, then the judge will be under severe, maybe insurmountable, pressure to find (or perhaps manufacture?) such an error—even if, in the abstract, the procedures used in the state courts were well within the range of reasonable fairness. In other words, a process-oriented solution for a substantive problem can, if the matter is important enough to compel judicial action, provoke an otherwise unwarranted expansion of procedural law.

Second, given the first difficulty, the procedural law is likely eventually to expand to the point where it substantially over-regulates. The primary problem is that, every time a federal court announces a new procedural rule for the purpose of overturning a state death sentence with which the judge does not agree, the rule does not disappear after the particular case is over—rather, it becomes federal law that must be applied by other courts to other cases. As the federal law becomes increasingly more complex, procedural errors may be found in many cases even though all courts would agree that the results of those cases were correct. In the death-penalty context, habeas courts often deal with cases in which the federal procedural rules were violated, but in which the result of the proceeding was nevertheless correct, and in which reversal would thus impinge on the values of federalism and comity without producing a corresponding improvement in the basic justice of the outcome. In such cases, habeas courts face severe pressure to devise and apply curative methods (such as “harmless error” doctrines) to preserve the correct result even in the face of a recognized violation of federal procedural law.

* * * * *

Aware of the adverse impact that its Eighth Amendment procedural doctrines have had on the administration of state death-penalty systems, but unwilling to dismantle completely the doctrines themselves (because of stare decisis and the usefulness of the doctrines in setting aside undeserved death sentences), the Supreme Court has, predictably, looked for ways to minimize the practical effect of these procedural doctrines.

One such strategy was to create, within the context of Eighth Amendment law itself, a “harmless error” doctrine designed to preserve some morally

deserved death sentences despite clear violations of Eighth Amendment procedural law. The two prime examples of this approach are *Zant v. Stephens*⁴⁵ and *Barclay v. Florida*,⁴⁶ which at one time were derided as having effectively "deregulated" the use of the death penalty.⁴⁷

But time has demonstrated that most state death-penalty cases do not fit within the *Stephens/Barclay* "harmless error" doctrine, the applicability of which depends entirely on certain peculiarities of a particular state's death-penalty statute and/or case law.⁴⁸ So the Court has turned, instead, to making changes in federal habeas law as the primary method for limiting the practical effect on the states of the Court's ever-growing body of procedural Eighth Amendment law.

Thus, in a line of cases starting with *Wainwright v. Sykes*,⁴⁹ the Court has held that the federal claims of death-row inmates (and other habeas petitioners as well) are subject to valid state procedural bars arising from the strategic decisions or oversights of defense lawyers in failing to present claims for resolution by the state courts (unless the oversight rises to the level of constitutional ineffectiveness of counsel). Through expansive interpretations of the exhaustion,⁵⁰ successive-petition,⁵¹ and abuse-of-the-writ⁵² doctrines, the Court has also made it difficult for habeas petitioners to litigate federal claims that have not yet been presented to the state courts, that have previously been rejected by a habeas court, or that could have been but were not raised in a prior habeas petition. And, in *Teague v. Lane*,⁵³ the Court also barred most habeas petitioners from relying on violations of new federal rules that were established or substantially clarified after the state courts had already completed their review of the petitioner's case.⁵⁴

45. 462 U.S. 862 (1983).

46. 463 U.S. 939 (1983).

47. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

48. See, e.g., *Clemons v. Mississippi*, 494 U.S. 738 (1990) (remanding case to Mississippi state court to determine whether Mississippi death-penalty law is structured in a manner that allows application of *Stephens/Barclay* "harmless error" law). Even in Florida, the *Barclay* version of "harmless error" law has not completely insulated death sentences from federal review and reversal. See, e.g., *Sochor v. Florida*, 112 S. Ct. 2114 (1992).

49. 433 U.S. 72 (1977).

50. See, e.g., *Rose v. Lundy*, 455 U.S. 509 (1982).

51. See, e.g., *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

52. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454, *reh'g denied*, 111 S. Ct. 2841 (1991).

53. 489 U.S. 288 (1989). Although the central proposition in *Teague* did not carry the votes of five Justices, the same proposition received majority support in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

54. See also *Butler v. McKellar*, 494 U.S. 407 (1990) (holding that the *Teague* rule applies whenever state courts could reasonably have disagreed over governing federal standard); *Stringer v. Black*, 112 S. Ct. 1130 (1992) (holding that the *Teague* rule applies to new federal precedent changing or clarifying the method for applying previous federal precedent to state cases).

These changes have limited the general availability of federal habeas relief for state prisoners. But, in developing these limits on habeas, the Court has been sensitive to the need for an exception that permits case-by-case federal review of the merits of an individual petitioner's conviction or sentence. For example, in connection with the procedural default, successive-petition, and abuse-of-the-writ doctrines, the Court has recognized an exception for particular cases in which a grant of habeas relief is required to prevent a "fundamental miscarriage of justice."⁵⁵ And *Teague* contains exceptions for cases involving (1) new rules restricting the substantive ability of the states to punish certain kinds of conduct, or to punish certain categories of defendants, and (2) new rules that are required to ensure "fundamental fairness," and without which confidence in the reliability of the outcome of the relevant proceeding would be greatly diminished.⁵⁶

Of course, these exceptions apply only when a habeas petitioner can also point to a particular federal procedural error in his case, and do not constitute independent grounds for habeas relief. Each of the exceptions can nevertheless be characterized as focusing the habeas courts indirectly on the substantive merits of a petitioner's case. As such, the exceptions have moved habeas law towards a more substantive, "actual innocence"-based approach. In capital cases, although the Court has recently defined the aforementioned exception to the successive-petition doctrine quite narrowly,⁵⁷ the Court's substantive approach to habeas law offers a valuable, albeit limited, antidote to the process-oriented view of the Eighth Amendment.

* * * * *

Where will habeas law go from here? What can we expect out of the Supreme Court in the next Term or two?

The recent changes in habeas law have done much to ameliorate the potential impact of the Court's Eighth Amendment law on the administration of the death penalty by the states. Yet there remain two large categories of habeas claims that are not generally precluded by the above doctrines, and that still pose a major practical problem for the states: (1) errors in the

55. See *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (recognizing exception to procedural default doctrine); *Kuhlmann*, 477 U.S. at 454 (recognizing exception to successive-petition doctrine); *McCleskey*, 111 S. Ct. at 1470 (recognizing exception to abuse-of-the-writ doctrine).

56. *Teague*, 489 U.S. at 311-13.

57. See *Sawyer v. Whitley*, 112 S. Ct. 2514, 2523 (1992), which defines "miscarriage of justice" in the capital sentencing context as legal ineligibility of the petitioner for the death penalty under appropriate state death-sentencing law (rather than, as might have been asserted, the moral inappropriateness of the death penalty as applied to the petitioner).

application of existing federal procedural law (largely involving "mixed" questions of fact and law) that were raised by the defense lawyer in the state courts but were there ignored or otherwise left unremedied; and (2) violations of existing federal law that were not raised in the state courts due to alleged constitutional ineffectiveness of defense counsel (currently defined in terms of "performance" and "prejudice," two "mixed" fact-and-law issues).⁵⁸ These two categories of habeas claims remain broadly available to death-row inmates, at least in first federal habeas petitions, and can prolong significantly the course of post-conviction litigation or lead to reversal of a death sentence.

If the Court is ever going to satisfy the vocal critics of active federal-court intervention in state capital cases, including some of its own members,⁵⁹ it will have to find a way to limit these two categories of habeas claims. This is where the future action is most likely to occur.

As previously explained, the Court's failure in *Wright v. West*⁶⁰ to adopt a deferential standard of review for "mixed" issues may reflect the unwillingness of most of the Justices to alter habeas law to the point of "deregulating" state death-penalty cases altogether. The Court, as a whole, does not appear ready to leave the death-penalty issue exclusively to the states, despite the fact that a few Justices might like to see that happen.⁶¹ Thus, although the standard of review for "mixed" issues was not resolved in *West* and could come up again as early as the current Term,⁶² it seems unlikely that Justice Thomas will soon find a majority to support his belief in across-the-board deference by federal habeas courts to prior state-court adjudications of federal issues.

The Court currently has before it two cases, however, that might provide vehicles for significant habeas reform. One of these cases, the aforementioned *Withrow v. Williams*,⁶³ involves a habeas court's disagreement with a state court over a particular application of the rule in *Miranda v. Arizona*,⁶⁴ a rule the Court has recently described, at least at the margins, as prophylactic.⁶⁵ In *Williams*, assuming that Justice Thomas does not obtain a majority for his proposed "deferential" habeas standard of review, the Court could choose to

58. See *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

59. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that the Court "reexamine our efforts in this area" to avoid further unjustified interference with administration of state death-penalty laws).

60. 112 S. Ct. 2482 (1992).

61. See Zimring, *supra* note 21, at 13-19.

62. *Withrow v. Williams*, 944 F.2d 284 (6th Cir. 1991), *cert. granted*, 112 S. Ct. 1664 (1992) (No. 91-1030), potentially raises the same question.

63. *Id.*

64. 384 U.S. 436 (1966).

65. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306-09 (1985).

restrict habeas relief on the alternative ground that *Miranda* violations, like the Fourth Amendment violations in *Stone v. Powell*,⁶⁶ generally do not raise doubt about the actual guilt of the petitioner. Thus, as the Court did with the Fourth Amendment claims in *Stone*, it could hold in *Williams* that prophylactic, purely *Miranda*-based Fifth Amendment claims generally are not cognizable in federal habeas.⁶⁷ This position was set forth in 1989 in a concurring opinion by Justice O'Connor, joined by Justice Scalia, in *Duckworth v. Eagan*.⁶⁸

The only problem with this approach to deciding *Withrow v. Williams* is that the lower federal courts not only found a *Miranda* violation in *Williams*, they also found the petitioner's relevant statement to be involuntary.⁶⁹ The case thus involves a core, rather than a mere technical, Fifth Amendment violation, and *Williams* therefore may not be a good vehicle for addressing the issue raised by Justice O'Connor in *Duckworth v. Eagan*.⁷⁰ At the very least, the Court will be required to do some fancy footwork to reach the *Stone v. Powell* issue in *Williams*.

The other potentially significant habeas case currently pending before the Court is *Lockhart v. Fretwell*,⁷¹ a capital case in which the habeas petitioner claims that his defense lawyer failed to raise in state court a federal issue that would have been a winner at the time under the then-existing federal-circuit precedent (that is, the claim would have required the federal circuit court to reverse the petitioner's death sentence), but that is no longer a winner because

66. 428 U.S. 465 (1976).

67. Under *Stone*, habeas courts are barred from considering Fourth Amendment claims unless a state court denied the defendant "an opportunity for full and fair litigation" of the claim. *Id.* at 482.

A closely related issue is presented in another habeas case pending before the Court. In *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992) (No. 91-7358), the Seventh Circuit held that, on collateral review, the appropriate standard for "harmless error" in the application of a prophylactic rule (in *Brecht*, the *Miranda* rule) is whether the error "had substantial and injurious effect or influence in determining the jury's verdict," *see* *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), rather than the broader "beyond a reasonable doubt" standard for constitutional harmless error that was articulated in *Chapman v. California*, 386 U.S. 18 (1967). *Brecht*, 944 F.2d at 1370-74. The Seventh Circuit based its holding on the themes of federalism and finality, noting that it was ultimately adopting a "middle ground between federal review that duplicates the direct appeal and federal review that is, after the fashion of [*Stone v. Powell*, 428 U.S. 465 (1976)], next to no review." *Brecht*, 944 F.2d at 1372.

68. 492 U.S. 195, 205 (1989).

69. *See Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991), *cert. granted*, 112 S. Ct. 1664 (1992) (No. 91-1030).

70. Arguably, even a "core" violation like the one in *Williams*, to the extent it does not call into serious question the actual guilt of the defendant, should still be encompassed by the *Stone v. Powell* rationale and thus excluded from habeas review. Under this view, only Fifth Amendment violations that would likely produce unreliable statements (e.g., physical beatings) would be cognizable in habeas.

71. 946 F.2d 571 (8th Cir. 1991), *cert. granted*, 112 S. Ct. 1935 (1992) (No. 91-1393).

of a subsequent pro-state change in the circuit's interpretation of the governing federal law. The federal court of appeals granted petitioner's request for habeas relief, and ordered the entry of a judgment favorable to him (imposing a life sentence).⁷²

Fretwell is an interesting case because it involves the issue that Justice Powell wrote about in a concurring opinion in *Kimmelman v. Morrison*.⁷³ There, a habeas petitioner argued that he should obtain habeas relief because his defense lawyer failed to raise in state court a Fourth Amendment objection to the admission of a crucial piece of incriminating physical evidence. The Court found the petitioner's claim cognizable in habeas, despite *Stone v. Powell*, because it was based on constitutional ineffectiveness of defense counsel rather than on the Fourth Amendment directly.⁷⁴ Justice Powell, writing separately, noted that the case might be outside the proper scope of "prejudice" for Sixth Amendment ineffective assistance purposes, because a victory by the petitioner in state court would not have been based on actual innocence, but instead would have been an undeserved windfall.⁷⁵ Because this issue was not raised by the parties in *Kimmelman*, it was not squarely addressed by the Court majority.⁷⁶

Fretwell is, if anything, a much stronger case for the application of Justice Powell's approach to defining Sixth Amendment "prejudice" than was *Kimmelman v. Morrison*. In *Fretwell*, a victory by the petitioner would have been worse than a mere windfall; it would have been an out-and-out mistake under the governing federal law as currently construed by the federal courts. Another way to look at the *Fretwell* case is as follows: Even if the petitioner in *Fretwell* were entitled to habeas relief, what would happen if the state were to convene a resentencing hearing? The hearing would be conducted according to current federal law, meaning that the same federal procedural "error" that led to reversal of the petitioner's original death sentence could occur lawfully at the resentencing hearing.

Of course, this is precisely why the lower federal court chose the unusual remedy of ordering entry of judgment in favor of the petitioner, instead of letting the state try to resentence him to death. Unfortunately, it is also precisely why *Fretwell* is a poor vehicle for considering the views articulated

72. *Id.*

73. 477 U.S. 365, 391 (1986).

74. *Id.* at 373-83.

75. *Id.* at 394-96 (Powell, J., concurring in the judgment); see also Jeffries & Stuntz, *supra* note 13, at 687-88, 712-13 (agreeing with Justice Powell's position).

76. See *Kimmelman*, 477 U.S. at 380 ("[W]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.").

in Justice Powell's *Kimmelman v. Morrison* concurrence. The decision below in *Fretwell* is so flawed that the Court can reverse it for any one of three reasons: (1) it can adopt Justice Powell's views about ineffective assistance of counsel; (2) it can hold that a pro-state change in the interpretation of federal law occurring after a petitioner's trial or sentencing hearing always applies retroactively to the petitioner's habeas case, thus precluding habeas relief;⁷⁷ and/or (3) it can reject the lower court's unusual remedy, and find the case to be an example of per se "harmless error." Because the Court has three ways to reverse in *Fretwell*, the case may wind up being decided on an alternative ground without addressing the *Kimmelman* issue.

Even if neither *Withrow v. Williams* nor *Lockhart v. Fretwell* turns out to be an important habeas case, however, the issues lurking therein are important and very likely to arise again in the immediate future. The extension of *Stone v. Powell* to prophylactic Fifth Amendment claims (and others similarly unrelated to actual guilt), and the adoption of Justice Powell's *Kimmelman v. Morrison* views about the Sixth Amendment's effective assistance of counsel guarantee, would dramatically reduce the practical effect on the administration of the death penalty of the two remaining major categories of federal habeas claims. More importantly, these changes would render habeas relief more heavily dependent upon the substantive merits of individual cases—both of these changes stem from the basic idea that, in general, certain claims do not justify habeas relief because the alleged violations tend to be irrelevant to actual guilt.

* * * * *

In the end, the Supreme Court may be fighting a losing battle. The changes in habeas law that have already occurred, or that might occur in *Williams*, *Fretwell*, and/or similar cases, are second-best measures designed to introduce the merits of state capital cases into federal habeas courts through the back door—they do not represent the needed frontal assault on the process orientation of modern Eighth Amendment law. As such, these habeas cases do not hold out much promise of solving, once and for all, the problems created by the Court's misguided use of a procedural solution for a substantive problem.

Perhaps *Herrera v. Collins*⁷⁸ will force the Court to rethink the grave implications of its procedural Eighth Amendment approach. If the Court holds

77. This would be a variation on the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989).
78. 954 F.2d 1029 (5th Cir. 1992), *aff'd*, 113 S. Ct. 853 (1993).

in *Herrera* that "actual innocence" in a death-penalty case is sufficient to justify habeas relief, then it is only a short step further for the Court to say that "moral undeservedness" of a death sentence is similarly sufficient.⁷⁹ And if the Court is willing to entertain that possibility, then the federal courts may someday be able to spend their time dealing directly with the question of whether particular state-imposed death sentences are morally deserved. If not, then the Court, and the lower federal courts as well, may be consigned to the murky depths of habeas law for the foreseeable future.

AUTHOR'S EPILOGUE

On January 25, 1993, while this Essay was going to press, the Supreme Court handed down its decision in *Herrera v. Collins*.⁸⁰ The decision strongly suggests that the Court is not yet prepared to hop off the endless merry-go-round that it boarded when it first chose to interpret the Eighth Amendment in death-penalty cases primarily in procedural, rather than substantive, terms.

Unfortunately (for both the defendant and, in my view, the jurisprudence of the Eighth Amendment), the Court in *Herrera* never reached the question whether the Eighth Amendment prohibits the execution of a defendant who makes an adequate showing, based on newly discovered evidence, of "actual innocence." The Court did not reach this question because six of the Justices concluded that, no matter what standard might be used to define such an "adequate showing," the defendant in *Herrera* could not possibly meet the standard.⁸¹ Thus Chief Justice Rehnquist, writing for five of the six Justices,

79. This would effectively create a robust, case-specific, death-penalty version of the Court's moribund Eighth Amendment proportionality doctrine. Compare *Solem v. Helm*, 463 U.S. 277 (1983) (using Eighth Amendment proportionality doctrine to invalidate noncapital sentence) with *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684-2701 (1991) (Scalia, J., joined by Rehnquist, C.J.) (rejecting proportionality analysis of *Solem v. Helm*, 463 U.S. 277 (1983)) and *id.* at 2706-07 (concurring opinion of Kennedy, J., joined by O'Connor and Souter, JJ., modifying proportionality analysis of *Solem v. Helm*).

80. 113 S. Ct. 853 (1993), *aff'g* 954 F.2d 1029 (5th Cir. 1992). On the same day, the Court also decided *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993). Predictably, the *Fretwell* Court reversed the Eighth Circuit's grant of habeas relief. Chief Justice Rehnquist, writing for a majority of seven Justices, based the decision primarily on Justice Powell's concurring opinion in *Kimmelman v. Morrison*, 477 U.S. 365 (1986): "[T]he 'prejudice' component of [*Strickland v. Washington*, 466 U.S. 668 (1984),] . . . focusses on . . . whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. . . . Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Fretwell*, 113 S. Ct. at 844. *Fretwell* thus narrows somewhat the scope of the Sixth Amendment's ineffective-assistance-of-counsel doctrine, and thereby further limits the availability of habeas relief in one of the two remaining large categories of habeas claims.

81. *Herrera*, 113 S. Ct. at 869.

identified some of the practical and legal/doctrinal problems that would follow the adoption of an "actual innocence" Eighth Amendment rule. Nevertheless, he proceeded to dispose of the case based on the "assum[ption], for the sake of argument," that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."⁸² Justice White, concurring in the judgment, made the same assumption.⁸³

If the Court had reached the constitutional issue in *Herrera*, it might have used the case to begin the process of "substantifying" its Eighth Amendment jurisprudence. Indeed, a reading of the "tea leaves" in *Herrera* suggests that, if the issue were properly raised, a majority of the Court would interpret the Constitution to require at least a limited federal (substantive) review of a defendant's claim of innocence. The three dissenters would require such a review whenever a defendant could show that he is "probably actually innocent."⁸⁴ And Justice O'Connor, joined by Justice Kennedy, wrote in concurrence: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed . . . the execution of a legally and factually innocent person would be a constitutionally intolerable event."⁸⁵

The problem is that, given the disposition of *Herrera*, the Court is highly unlikely to reach the Eighth Amendment issue anytime soon. Justice O'Connor, in particular, frankly admitted her Pollyannaish hope that the Court might be able forever to duck the question:

Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. . . .

. . . [T]he Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.⁸⁶

Unfortunately, it should be obvious to anyone (except maybe Justice O'Connor) that, no matter how good the applicable procedures, any system that relies on human beings to make decisions will eventually make a mistake. This being so, the only remaining argument against recognizing a (limited)

82. *Id.* at 869.

83. *Id.* at 875 (White, J., concurring in the judgment).

84. *Id.* at 883 (Blackmun, J., dissenting, joined in part by Stevens and Souter, JJ.).

85. *Id.* at 870 (O'Connor, J., concurring) (citation omitted).

86. *Id.* at 871, 874 (O'Connor, J., concurring).

right to federal substantive review seems to be the *Herrera* majority's claim that, "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."⁸⁷ The Court's federalism concerns are valid, but its conclusion could not be more wrong. In truth, nothing could be more disruptive of our federal system than the present world of federal habeas litigation in capital cases—a bizarre world in which state-court judgments are stayed for years, even decades, while defendants argue procedural Eighth Amendment issues unrelated to the factual correctness of their convictions and sentences, and states' attorneys respond by raising technical habeas defenses similarly unrelated to the merits of the case.

This bizarre world of federal habeas litigation is the natural by-product of the Court's procedural Eighth Amendment orientation. It is time for the Court to recognize the fundamental interdependence of death-penalty and habeas law, and bring an end to the ascending spiral of technicality and complexity that currently characterizes both bodies of law. It is time for the Court to put some "substance" back into the Eighth Amendment.

87. *Id.* at 861.